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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

MICHAEL ALAN CLAPP, Plaintiff and Appellant, v. RANDY TERRY et al., Defendants and Appellants.	C076562 (Super. Ct. No. SCSCCV10790)

This appeal involves the proper method for calculating an award of attorneys' fees and costs following a civil rights action brought under title 42 United States Code section 1983 (section 1983). The underlying case stems from the arrests of plaintiff Michael Alan Clapp on December 7, 2008, and February 4, 2009. The jury found that defendants Siskiyou County Sheriff Deputies Randy Terry and Jason Jones used excessive force on February 4, 2009, and awarded Clapp all of his claimed medical expenses of $3,608.43 and an additional $8,925.00 for past physical pain and mental suffering. The jury also awarded Clapp $500 in punitive damages against Deputy Terry. Plaintiff, however, did not succeed on all of his claims. There was no excessive force found as to the December

7, 2008, arrest involving defendant Deputy Sheriff Jeremiah LaRue, and no liability on the part of defendants County of Siskiyou and Siskiyou County Sheriff Rick Riggins. The trial court entered judgment against Deputy Terry in the full amount of $13,033.43 and against Deputy Jones in the amount of $1.

Clapp sought attorneys' fees and costs as the prevailing party under title 42 United States Code section 1988 (section 1988). The trial court awarded Clapp less than half of his claimed attorneys' fees and costs. Clapp then filed an application for supplemental attorneys' fees and costs incurred in support of his original application. This time, the court granted Clapp's request almost in its entirety.[1]

Clapp appeals the trial court's ruling on his original application for attorneys' fees and costs. He contends the court erred in its calculation of reasonable attorneys' fees and by failing to award all of his requested costs under section 1988. Deputies Terry and Jones cross-appeal the supplemental attorneys' fees and costs order. In the cross appeal, they primarily assert the trial court erred by refusing to consider Clapp's degree of success before awarding supplemental attorneys' fees and costs.

We conclude the trial court abused its discretion by using the results obtained in the litigation as the basis for two separate reductions from the attorneys' fees award. The court also made the opposite mistake when it failed to consider the results obtained in the litigation when it ruled on Clapp's request for supplemental attorneys' fees and costs. Additionally, we note the trial court failed to rule on the additional costs claimed in the separate application for merits attorneys' fees and costs. Accordingly, we vacate both

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[1] The trial court originally calculated Clapp's attorneys' fees at a rate of $435 per hour for attorney Carol Quackenbos. In his supplemental application, Clapp sought a 2.5% increase to $445 per hour for Quackenbos. The trial court granted an increase, but only to $350, based apparently on the fact it had transposed her rate with another attorney's at one point in the prior order to state that Quackenbos's rate was $340 per hour. That stray typographical error in the original order cost Clapp almost $4,000 in the second order.

orders and remand for recalculation and further consideration in light of the proper legal standards and for the trial court to rule on the unadjudicated costs in the first instance.

I. BACKGROUND

A. Trial Court's Decision on Clapp's First Application for Attorneys' Fees and Costs

On or around April 17, 2013, Clapp filed a memorandum of costs seeking $6,227.85. On July 1, 2013, he filed a separate application that sought $440,473 in attorneys' fees and $15,222.12 in costs, including the costs claimed in his previously-filed memorandum of costs.

On March 25, 2014, the trial court filed an order on attorneys' fees and costs. The court calculated Clapp's attorneys' fees award by taking the total attorney hours requested and subtracting the hours attributable to defendants against whom Clapp did not succeed.[2] The court then multiplied the remaining hours by the requested rates to produce a total lodestar of $439,799.80.[3] Next, the court adjusted the lodestar by subtracting 5% for efficiency (a reduction proposed by Clapp) for a total of $417,790.81. Finally, the court made the following reduction: "[t]he fees are further adjusted by .40 of the lodestar to arrive [at] a total award of $167,116.32." The court explained how it arrived at the .4 multiplier as follows: "In the case at bar Mr. Clapp made a nominal recovery against one defendant, a moderate amount against another and no recovery against either the County, its sheriff or a remaining deputy. The jury found that there were no inherent defects in the training of Siskiyou County Sheriffs deputies or that either Siskiyou County or former Sheriff Riggins was otherwise responsible for Mr. Clapp's damages. As found by the jury, the only culpability lay with the two individual

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[2] The trial court disallowed all requested paralegal fees.

[3] This includes an error whereby the court calculated that 96.8 hours at a rate of $435 per hour for Quackenbos equals $41,760 instead of $42,108. The total lodestar should have been $440,127.80.

defendants, not the institutional defendants. The court finds there was no discernible public benefit from the suit against Siskiyou County or former Sheriff Riggins. The court finds that, in comparing this outcome and the relatively small amount of the award, to the scope of the litigation as a whole, the lodestar should be adjusted by a **multiplier of .4**." The court's order also stated "costs are awarded to Plaintiff in the sum of $6,227.85." Clapp timely appealed this order.

B. Trial Court's Decision on Clapp's Supplemental Application for Attorneys' Fees and Costs

On April 30, 2014, Clapp filed a supplemental application for attorneys' fees and costs incurred in connection with his original application for attorneys' fees and costs. Defendants argued the court should reduce the requested award by the same multiplier it used to calculate the merits fees and costs. The court declined to do so. It explained, "Plaintiff was successful, at least in part, in the prosecution of his case. It was necessary for him to bring his motion for merit fees and costs and, in doing so, necessarily incurred additional attorney fees to prosecute that motion. Although the litigation fees may be modified by the imposition of a lodestar and the possible modification of that amount by a multiplier based on the degree of success in the underlying litigation, Plaintiff should not be subject to the same reduction on a motion for supplemental attorney fees and costs. A request for supplemental fees is not merit based and should not be predicated on the same criteria used to determine merit fees based on degree of success. The court therefore declines to reduce the award for supplemental fees and costs consistent with the reduction of the award for litigation fees and costs." The court awarded Clapp $72,506.50 for attorneys' fees and $2,126.78 for costs incurred for his original application for attorneys' fees. Deputies Terry and Jones timely appealed this order.

II. DISCUSSION

A. Standard of Review

Section 1988, subdivision (b) provides that in section 1983 actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." "The entitlement to section 1988 fees is part of the remedy for section 1983 violations 'whether the action is brought in federal or state court.' [Citation.] Because the entitlement arises under federal law, 'we follow the federal standard for determining section 1988 issues.' " (*Kerkeles v. City of San Jose* (2015) 243 Cal.App.4th 88, 99.)

We review the trial court's assessment of the reasonable attorneys' fees for abuse of discretion, but we review the legal principles underlying the fee award de novo. (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1111.) "Thus, we will overturn a [trial] court's fee award if it is based on an inaccurate view of the law." (*Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359, 362.)

The trial court must "provide a reasonably specific explanation for all aspects of a fee determination," including any adjustment. (*Perdue v. Kenny A.* (2010) 559 U.S. 542, 558.) "When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the [trial] court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 437 (*Hensley*).) "Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected." (*Moreno v. City of Sacramento, supra,* 534 F.3d at p. 1111.)

B. Merits Attorneys' Fees

In this case, the trial court used the lodestar method to calculate attorneys' fees. The United States Supreme Court has consistently reaffirmed the lodestar method as

" ' "the guiding light of [its] fee-shifting jurisprudence." ' " (*Perdue v. Kenny A., supra,* 559 U.S. at p. 551, quoting *Gisbrecht v. Barnhart* (2002) 535 U.S. 789, 801.) Under it, a trial court starts by determining how many hours were reasonably expended on the litigation, and then multiplying those hours by a reasonable hourly rate. (*Hensley, supra,* 461 U.S. at p. 433; *Moreno v. City of Sacramento, supra*, 534 F.3d at p. 1111.) There is a strong presumption that the product of this calculation is the "reasonable attorney's fee" contemplated by section 1988. (*City of Burlington v. Dague* (1992) 505 U.S. 557, 562; *Blum v. Stenson* (1984) 465 U.S. 886, 897 (*Blum*).)

But this presumption is not conclusive. After making this initial calculation, the trial court then determines whether to adjust the lodestar figure on the basis of any *Johnson/Kerr* factors that are not already subsumed in the initial lodestar calculation.[4] (*Morales v. City of San Rafael, supra*, 96 F.3d at pp. 363-364.) The *Johnson/Kerr* factor at issue in this appeal is the "results obtained" by the successful plaintiff. Understanding the trial court's error in calculating Clapp's merits attorneys' fees requires a deeper examination of this factor and the law regarding its utilization in attorneys' fee awards.

In *Hensley*, the United States Supreme Court held that the "results obtained" are "a crucial factor in determining the proper amount of an award of attorney's fees under [section] 1988." (*Hensley, supra,* 461 U.S. p. 440.) Where, as here, "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the

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4 These factors are: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." (*Kerr v. Screen Extras Guild, Inc*. (9th Cir. 1975) 526 F.2d 67, 70 (*Kerr*); see *Johnson v. Georgia Highway Express, Inc*. (5th Cir. 1974) 488 F.2d 714, 717-719 (*Johnson*).)

litigation as a whole times a reasonable hourly rate may be an excessive amount." (*Id.* at p. 436.) Therefore, courts must "consider the relationship between the extent of [a plaintiff's] success and the amount of the fee award." (*Id.* at p. 438.) Nonetheless, a plaintiff does not need to prevail on every claim to receive a full fee. (*Id.* at p. 435.) "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." (*Ibid.*) Likewise, sometimes a civil rights case "will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the [trial] court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." (*Ibid.*) The *Hensley* court held "[t]here is no precise rule or formula for making these determinations. The [trial] court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." (*Id.* at pp. 436-437.)

Significant to our analysis in this case, since *Hensley*, the Supreme Court has held that the "results obtained" are among those *Johnson/Kerr* factors generally subsumed within the initial lodestar calculation. (*Blum, supra*, 465 U.S. at p. 900; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986) 478 U.S. 546, 565 ["Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors 'are subsumed within the initial calculation' of the lodestar, we specifically held in *Blum* that . . . the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award"].) Some intermediate federal appellate courts have therefore held the "results obtained" factor should be considered when determining the reasonable number of hours expended and the reasonable hourly rates of the attorneys. (*Bywaters v. United States* (Fed. Cir. 2012)

670 F.3d 1221, 1231.) The Ninth Circuit has merely noted that "[a]djusting the lodestar on the basis of subsumed reasonableness factors [including "results obtained"] after the lodestar has been calculated, instead of adjusting the reasonable number of hours or reasonable hourly rate at the first step, i.e. when determining the lodestar, is a disfavored procedure." (*Morales v. City of San Rafael*, *supra*, 96 F.3d at p. 364, fn. 9.) The general statement that the "results obtained" factor is ordinarily subsumed in the lodestar reflects in part the assumption that any hours attributable to unsuccessful claims were already reduced in calculating the hours reasonably expended on the litigation and thus the lodestar: "Only in rare or exceptional cases will an attorney's *reasonable* expenditure of time on a case not be commensurate with the fees to which he is entitled." (*Cunningham v. County of Los Angeles* (9th Cir. 1988) 879 F.2d 481, 488.) A trial court must therefore be cautious when considering whether additional adjustments to the lodestar based on the "results obtained" factor are warranted. "[W]here a factor is generally considered as part of the lodestar, further adjustments based on that factor will ordinarily amount to impermissible double counting and will rarely be sustained." (*Ibid*.) Additionally, a trial court abuses its discretion where it makes a duplicative adjustment based on the "results obtained" factor without an explanation for why it was not adequately accounted for in the first adjustment. (See *id.* at p. 489 ["In exceptional cases, such [double counting] may be proper, but the court must explain why the results of the lawsuit are not adequately factored into the lodestar. Because the district court did not do so, it abused its discretion"].) As we will explain, this is the mistake the trial court made in this case.

Clapp contends the trial court's multiplication of the lodestar by .4 constituted an impermissible double reduction. We agree. Interestingly, the trial court implicitly acknowledged the prohibition against duplicative deductions. It quoted the following passage from *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417-418: "Where ' "the plaintiff achieved only limited success," ' the court ' "should award only that amount of fees that is reasonable in relation to the results obtained."

[Citation.] In conducting this analysis, a court "may attempt to identify specific hours that should be eliminated, *or* it may simply reduce the award to account for the limited success." [Citation.]' " (Italics added.) The trial court abused its discretion because it did both: It identified specific hours that should be eliminated, *and* it reduced the award to account for Clapp's limited success as reflected in those already-reduced hours without any explanation for why a double reduction was warranted. (See *Cunningham v. County of Los Angeles, supra,* 879 F.2d at p. 488 [reversing second round of reductions to lodestar as double counting].) As we set forth above, the trial court arrived at the .4 multiplier based largely (and possibly entirely) on the fact Clapp did not establish liability as to the county, the sheriff or Deputy LaRue. To deduct 60% from the total award on this basis after reducing the allowable attorney hours for same reason is an impermissible double reduction.

Deputies Terry and Jones's assertion that there was no double reduction is not supported by trial court's order or its calculations. The trial court began by taking the total hours claimed per attorney and subtracting the hours the court disallowed as attributable to defendants Clapp did not succeed against. The court then multiplied the awarded hours by the requested rates to produce a lodestar of $439,779.80. Next, the court adjusted the lodestar by subtracting 5% for a total of $417,790.81. Finally, the court stated "[t]he fees are *further adjusted* by .40 of the lodestar to arrive [at] a total award of $167,116.32." (Italics added.) The math supports the trial court's words: .4 multiplied by $417,790.81 is $167,116.32. Deputies Terry and Jones's claim that the trial court calculated the award differently is incorrect and would not eliminate a double reduction in any event. (See *Moreno v. City of Sacramento, supra,* 534 F.3d at p. 1115 ["It is possible, of course, for a [trial] court to reduce both the hours and hourly rate awarded for some tasks. But the [trial] court must exercise extreme care in making such reductions to avoid double counting"].) For this reason, the trial court abused its

discretion in reducing the lodestar by multiplying it by .4 after it reduced the number of hours awarded on the same theory.

Clapp asks us to reverse all of the .4 multiplier because, even apart from its redundancy, he alleges there was no valid basis for applying an across-the-board cut to the lodestar. While this may be the case, we will remand instead. The trial court's discussion of how it arrived at the .4 multiplier focuses on the fact Clapp did not prevail against the county, Sheriff Riggins or Deputy LaRue, but it also notes generally the amount of the award in relation to the scope of the litigation as a whole: "In the case at bar Mr. Clapp made a nominal recovery against one defendant, a moderate amount against another[5] and no recovery against either the [c]ounty, its sheriff or a remaining deputy. . . . The court finds that, in comparing this outcome and the relatively small amount of the award, to the scope of the litigation as a whole, the lodestar should be adjusted by a **multiplier of .4**." On this record, it is not clear the trial court had in mind a permissible basis for further reducing the award to support any portion of the multiplier and thus that this is the rare case that would support an additional reduction. (See *Cunningham v. County of Los Angeles*, *supra*, 879 F.2d at p. 489 ["In exceptional cases, [double counting] may be proper, but the court must explain why the results of the lawsuit are not adequately factored into the lodestar"].) But rather than speculating as the parties do, we will remand for the trial court to recalculate Clapp's attorneys' fees consistent with this opinion.

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[5] "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. . . . '[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "*for all time reasonably expended on a matter*." ' " (*City of Riverside v. Rivera* (1986) 477 U.S. 561, 575.)

C. Merits Costs

"Under [section] 1988, the prevailing party 'may recover as part of the award of attorney's fees those out-of-pocket expenses that "would normally be charged to a fee paying client." ' [Citation.] Such out-of-pocket expenses are recoverable when reasonable." (*Dang v. Cross* (9th Cir. 2005) 422 F.3d 800, 814.) As noted above, the trial court awarded only those costs that appeared in the memorandum of costs. Clapp correctly observes the court's order is silent as to all of the claimed costs that appeared only in his separate application for attorneys' fees and costs. Clapp contends this was error and we should reverse and award all his requested costs. Again, we agree there was error but disagree with Clapp's proposed remedy. The trial court did not exercise its discretion as to the costs that appeared only in the separate application for attorneys' fees and costs. We are in no position to determine on appeal if these are reasonable costs that would normally be charged to a fee paying client. We remand for the trial court to exercise its discretion as to these claimed costs in the first instance.

D. Supplemental Attorneys' Fees and Costs

Deputies Terry and Jones assert the trial court erred in awarding supplemental attorneys' fees and costs because it refused to consider the degree of success on the original fee claim. They are correct. *Hensley* held that courts must "consider the relationship between the extent of success and the amount of the fee award." (*Hensley*, *supra*, 461 U.S. at p. 438.) And "*Hensley* applies to requests for fees-on-fees." (*Thompson v. Gomez* (9th Cir. 1995) 45 F.3d 1365, 1367.) But the trial court's order reflects a mistaken impression that it does not: "A request for supplemental fees is not merit based and should not be predicated on the same criteria used to determine merit fees based on degree of success. The court therefore declines to reduce the award for supplemental fees and costs consistent with the reduction of the award for litigation fees and costs." The order thus does not reflect the correct legal analysis. "It is an abuse of discretion for the [trial] court to award attorneys' fees without considering the

relationship between the 'extent of success' and the amount of the fee award." (*McGinnis v. Kentucky Fried Chicken of Cal.* (9th Cir. 1994) 51 F.3d 805, 810.) Where, as here, a plaintiff has achieved only partial success, the product of hours reasonably expended times a reasonable hourly rate may still be an excessive amount. (*Hensley, supra,* 461 U.S. at p. 436.) Specifically, "fees for fee litigation should be excluded *to the extent* that the applicant ultimately fails to prevail in such litigation." (*Comm'r v. Jean* (1990) 496 U.S. 154, 163, fn. 10, italics added.) Of course, the trial court may conclude that even though Clapp did not receive all of his requested attorneys' fees (or, on remand, perhaps all of his requested costs) relating to the merits, all of the hours his attorneys spent compiling and defending that request were reasonable. The problem is the trial court's order does not reflect any analysis or explanation on this point. Accordingly, we remand the court's order on the application for supplemental attorneys' fees and costs for the court to apply the proper legal standard and provide an explanation for its ruling.

Deputies Terry and Jones also argue the supplemental cost award was inappropriate because Clapp did not file a memorandum of costs and only the claimed filing fees are recoverable under Code of Civil Procedure section 1033.5. We disagree. Clapp sought supplemental costs under section 1988 only. As we set forth above, costs are recoverable as part of an attorneys' fees request under this section when they would normally be charged to a fee paying client. (*Dang v. Cross, supra,* 422 F.3d at p. 814.)[6] Whether these costs were recoverable under California law is irrelevant.

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[6] In their reply brief, these defendants argue for the first time that in order to obtain reimbursement for computer-related legal research costs Clapp needed to establish "separate billing for such expenses is 'the prevailing practice in the *local community*.' " (*Trs. of Constr. Indus. & Laborers Health & Welf. Trust v. Redland Ins. Co*. (9th Cir. 2006) 460 F.3d 1253, 1258-1259, italics added.) They have forfeited our consideration of this argument by failing to raise it earlier. (*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061, fn. 7.)

III. DISPOSITION

The orders are reversed, and the matter is remanded to allow the trial court to recalculate Clapp's merits attorneys' fees and reconsider Clapp's application for supplemental attorneys' fees and costs consistent with this opinion and to exercise its discretion regarding the unadjudicated request for costs pursuant to title 42 United States Code section 1988 in the first instance. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3) & (5).)

/S/

RENNER, J.

We concur:

/S/

NICHOLSON, Acting P. J.

/S/

DUARTE, J.